Mohamed bin Kanathi Meerah Mydin v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO P-05(M)-16–01 OF 2018
AHMAD ASNAWI, ABDUL RAHMAN SEBLI AND KAMARDIN HASHIM JJCA
29 NOVEMBER 2018

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Evidence — Accomplice — Uncorroborated accomplice evidence — Accused convicted on drug trafficking charge based on uncorroborated evidence of accomplice-turned-prosecution witness — Whether trial judge should have expunged accomplice's evidence in toto in view of case law and s 114(b) of the Evidence Act 1950 — Whether fact accomplice given a discharge not amounting to acquittal before he turned prosecution witness gave inference that if he did not give evidence favourable to the prosecution he might be re-arrested and re-charged — Whether accused's defence more probable and not an afterthought since it was put to witnesses during prosecution's case — Whether other 'independent evidence' trial court relied upon in convicting accused was inadmissible and unreliable — Whether trial judge erred in prematurely ruling that evidence of a material witness was irrelevant — Whether adverse inference should have been invoked against the prosecution for not calling the material witness

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The appellant was originally charged together with another person, PW1, with trafficking in 1,924g of cannabis. However, on the first day of the trial, the prosecution withdrew the charge against PW1 and asked that he be given an order of discharge not amounting to an acquittal ('DNAA') pursuant to s 254 of the Criminal Procedure Code. Once the DNAA was ordered, PW1 was immediately called as the prosecution's first witness against the appellant. The prosecution's case was that on the day of the offence, PW1 was sitting in the front passenger seat of a parked car owned and driven by the appellant when they were approached by two policemen on motorcycles on anti-crime patrol duty. On seeing the policemen, the car sped off. The policemen gave chase and finally detained the duo when the car stopped after colliding with another vehicle. On searching the car, the police found a package covered in gift wrapping on the back seat. The package contained the cannabis. In his defence to the charge, the appellant said that he had no knowledge about the drugs and that it was PW1 who brought the package into the car when he asked the appellant to send him to a friend's place so that he could hand over a birthday gift. The appellant also said it was PW1 who frightened him into speeding off when the policemen approached and thereafter he could not control the vehicle because PW1 was interfering with the control of the steering wheel. In contrast, PW1 denied any knowledge about the package or the drugs and said he did not bring the package into the car and that his friend, one Mohd Halim,

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could verify that fact (Mohd Halim was never called as a witness). PW1 also said he got into the car to collect *duit panggu* (alms) of RM450 from the appellant but when the policemen approached the vehicle, the appellant sped off, muttering 'dalam kereta ada barang'. The trial judge refused to believe the appellant's story and relied heavily upon PW1's evidence to convict the appellant and sentence him to the mandatory death penalty. The sole ground in the instant appeal against the conviction and sentence was that since PW1 was an accomplice-turned-prosecution witness, the trial judge should not have relied upon his uncorroborated evidence but should have expunged PW1's entire testimony especially because he was testifying under the duress of a DNAA which invited the inference that if he did not give evidence favourable to the prosecution he could be re-arrested and re-charged for the offence at any time.

Held, allowing the appeal, setting aside the conviction and sentence and acquitting and discharging the appellant:

(1) PW1 was an accomplice and it was trite law that an accomplice's evidence required corroboration — see s 114(b) of the Evidence Act 1950. Even though s 133 of the Evidence Act provided that a conviction based on the evidence of an accomplice alone was not illegal, case law warned of the danger of an accomplice concocting a story to throw the blame on the accused person (see paras 23–24 & 26–27).

(2) Although the trial judge had discretionary power to direct PW1 to be acquitted under s 254(3) of the CPC, he did not exercise that power. By giving only an order of DNAA, the charge against PW1 stayed and there was no bar for the prosecution to re-arrest and re-charge PW1 at a later stage. There was ample persuasive authority for the proposition that unless there were good grounds, it was not right to leave PW1 saddled with a charge hanging over his head for an indeterminate period. In the circumstances, the trial judge committed an error when he relied on PW1's evidence in convicting the appellant when he should have expunged or excluded from consideration PW1's evidence. And if PW1's evidence was excluded, the whole case of the prosecution tumbled and the charge against the appellant could not stand. Any other 'independent evidence' that the trial judge had relied upon in convicting the appellant was inadmissible and unreliable (see paras 39–40, 42 & 44).

(3) It was unsafe to rely on PW1's evidence to convict the appellant because: (a) if he had entered the car just to get the RM450 *duit panggu* from the appellant, why was there a need for him to sit in the front seat and travel with the appellant. The RM450 was also never recovered by the police from PW1 or from the appellant or from the car; and (b) Mohd Halim was never called as a witness to confirm PW1's allegation that he never brought the package into the car (see paras 30–32).

(4) The trial judge held that PW1's evidence was supported by the appellant's conduct of speeding off and in uttering the words 'matilah saya' when the police found the impugned drugs inside the package. The conduct of speeding off was explained by the appellant. The explanation was probable and admissible under s 9 of the Evidence Act 1950. With regard to the words 'matilah saya', it was wrongly admitted by the trial judge as it amounted to a confession for which no caution under s 37B(1)(b) of the Dangerous Drugs Act 1952 had been administered before or soon after the words were allegedly uttered. At that time, both the appellant and PW1 were already under police arrest (see para 25).

(5) The trial judge erred in law and in fact when he prematurely decided that the evidence of Mohd Halim was irrelevant. During cross-examination, the investigating officer, PW8, revealed that there was a witness who saw PW1 getting into the car. However, all questions put to PW8 regarding that witness (Mohd Halim) were not allowed by the trial judge as he found it to be irrelevant. Mohd Halim was a very important witness in determining the appellant's guilt as he would have been able to say whether or not the package which contained the impugned drugs was in PW1's hands before he entered the appellant's car. Even PW8 agreed with the suggestion that it was possible the impugned drugs belonged to PW1. Not only did the prosecution not call Abdul Mohd Halim as its witness, he was also not offered to the defence. The trial judge should have invoked adverse inference under s 114(g) of the Evidence Act 1950 against the prosecution for failing to call Mohd Halim (see paras 33–36).

[Bahasa Malaysia summary

Perayu pada asalnya dituduh bersama seorang lagi, PW1, kerana mengedar 1,924g kanabis. Walau bagaimanapun, pada hari pertama perbicaraan, pendakwaan telah menarik balik pertuduhan terhadap PW1 dan memohon agar dia diberikan perintah pelepasan tidak terjumlah kepada pembebasan ('PTTP') menurut s 254 Kanun Tatacara Jenayah. Setelah PTTP diperintahan, PW1 dengan segera telah dipanggil sebagai saksi pertama pendakwaan terhadap perayu. Kes pendakwaan adalah pada hari kesalahan itu, PW1 sedang duduk di tempat duduk penumpang bahagian hadapan kereta yang diparkir yang dimiliki dan dipandu oleh pemohon apabila mereka didatangi oleh dua polis bermotorsikal yang sedang menjalankan tugas rondaan pencegahan jenayah. Apabila melihat polis tersebut, kereta itu telah memecut pergi. Polis tersebut telah mengejar dan akhirnya menahan dua orang itu apabila kereta itu berhenti setelah melanggar kenderaan lain. Semasa memeriksa kereta tersebut, polis menjumpai satu bungkusan dalam balutan kertas hadiah di kerusi bahagian belakang. Bungkusan itu mengandungi kanabis. Dalam pembelaannya terhadap pertuduhan, perayu mengatakan bahawa dia tidak mempunyai pengetahuan tentang dadah itu dan bahawa ia adalah PW1 yang membawa bungkusan itu ke dalam kereta apabila dia meminta perayu

menghantarnya ke tempat seorang rakan supaya dia boleh menyampaikan hadiah hari jadi itu. Perayu juga mengatakan ia adalah PW1 yang menakutkannya untuk memandu laju apabila apabila polis tersebut mendekati mereka dan selepas itu dia tidak dapat mengawal kenderaan itu kerana PW1 mengganggu kawalan stering kereta. Sebaliknya, PW1 telah menafikan mempunyai apa-apa pengetahuan tentang bungkusan itu atau dadah tersebut dan mengatakan dia tidak membawa bungkusan itu ke dalam kereta dan bahawa rakannya, Mohd Halim boleh mengesahkan fakat tersebut (Mohd Halim tidak dipanggil sebagai saksi). PW1 juga mengatakan dia masuk ke dalam kereta untuk mengutip duit panggu (sedekah) berjumlah RM450 daripada perayu tetapi apabila polis tersebut mendekati kenderaan itu, perayu memecut, sambal mengatakan 'dalam kereta ada barang'. Hakim perbicaraan enggan mempercayai cerita perayu dan bergantung sepenuhnya kepada keterangan PW1 untuk mensabitkan perayu dan menghukumnya dengan penalti mati mandatori. Satu-satunya alasan dalam rayuan ini terhadap sabitan dan hukuman adalah oleh kerana PW1 seorang saksi pendakwaan yang bertukar menjadi rakan sejenayah, hakim perbicaraan tida patut bergantung kepada keterangan tanpa sokongannya tetapi patut membuang keseluruhan keterangan PW1 terutamanya kerana dia memberi keterangan di bawah paksaan PTTP yang mengundang inferens bahawa jika dia tidak memberikan keterangan yang memihak kepada pendakwaan dia boleh ditangkap semula dan dituduh semula kerana kesalahan itu pada bila-bila masa.

Diputuskan, membenarkan rayuan, mengetepikan sabitan dan hukuman dan melepas dan membebaskan perayu:

(1) PW1 adalah rakan sejenayah dan ia adalah undang-undang lapuk bahawa keterangan rakan sejenayah memerlukan sokongan — lihat s 114(b) AKta Keterangan 1950. Walaupun s 133 Akta Keterangan memperuntukkan suatu sabitan yang berdasarkan keterangan rakan sejenayah sendiri tidak menyalahi undang-undang, kes perundangan memberi amaran tentang bahaya rakan sejenayah mereka-reka cerita untuk meletakkan kesalahan kepada orang yang dituduh (lihat perenggan 23–24 & 26–27).

(2) Walaupun hakim perbicaraan mempunyai kuasa budi bicara untuk mengarahkan PW1 untuk dilepaskan di bawah s 254(3) KTJ, beliau tidak menggunakan kuasa tersebut. Dengan memberi hanya satu perintah PTTP, pertuduhan terhadap PW1 ditangguhkan dan tiada halangan untuk pendakwaan menangkap semula dan membuat pertuduhan semula terhadap PW1 pada peringkat seterusnya. Terdapat autoriti persuasive yang mencukupi untuk cadangan bahawa kecuali terdapat alasan yang kukuh, ia tidak wajar untuk membiarkan PW1 terbeban dengan pertuduhan terhadapnya untuk tempoh yang tidak pasti. Dalam keadaan tersebut, hakim perbicaraan telah melakukan kekhilafan apabila beliau bergantung kepada keterangan PW1 untuk

mensabitkan perayu walhal beliau sepatutnya membuang atau mengecualikan keterangan PW1. Dan jika keterangan PW1 dikecualikan, keseluruhan kes pendakwaan akan gagal dan pertuduhan terhadap perayu tidak dapat kekal. Apa-apa 'independent evidence' lain bahawa hakim perbicaraan telah bergantung kepada dalam mensabitkan perayu tidak boleh diterima dan tidak boleh dipercayai (lihat perenggan 39–40, 42 & 44).

(3) Ia tidak selamat untuk bergantung kepada keterangan PW1 untuk mensabitkan perayu kerana: (a) jika dia telah masuk ke dalam kereta hanya untuk mendapatkan RM450 duit panggu itu darpada perayu, kenapa ada kepelrlan untuknya duduk di tempat duduk bahagian depan dan perjalanan dengan perayu. RM450 itu juga tidak dijumpai oleh polis daripada PW1 atau daripada perayu atau daripada kereta itu; dan (b) Mohd Halim tidak dipanggil sebagai saksi untuk mengesahkan dakwaan PW1 bahawa dia tidak membawa bungkusan itu ke dalam kereta (lihat perenggan 30–32).

(4) Hakim perbicaraan memutuskan bahawa keterangan PW1 disokong oleh perbuatan perayu memandu laju dan mengungkap kata-kata 'matilah saya' apabila polis menjumpai dadah yang dipersoalkan di dalam bungkusan itu. Perbuatan memandu laju tidak diperjelaskan oleh perayu. Penjelasan itu adalah berkemungkinan dan boleh diterima di bawah s 9 Akta Keterangan 1950. Berhubung kata-kata 'matilah saya', ia telah salah diterima oleh hakim perbicaraan kerana ia merupakan pengakuan yag mana tiada amaran di bawah s 37B(1)(b) Akta Dadah Berbahaya 1952 telah dilaksanakan sebelum atau sejurus selepas kata-kata yang didakwa itu diungkapkan. Pada masa itu, kedua-dua perayu dan PW1 telahpun berada dalam tahanan polis (lihat perenggan 25).

(5) Hakim perbicaraan terkhilaf dari segi undang-undang dan fakta apabila beliau secar pramatang memutuskan bahawa keterangan Mohd Halim adalah tidak relevan. Semasa pemeriksaan balas, pegawai penyiasat, PW8, mendedahkan abhawa terdapat saksi yang nampak PW1 masuk ke dalam kereta itu. Walau bagaimanapun, kesemua soalan yang dikemukakan kepada PW8 berkaitan saksi tersebut (Mohd Halim) tidak dbenarkan oleh hakim perbicaraan kerana beliau mendapati ia tidak relevan. Mohd Halim merupakan saksi penting dalam menentukan kebersalahan perayu kerana dia akan dapat menagatakan sama ada atau tidak bungkusan yang mengandungi dadah yang dipersoalkan itu dalam tangan PW1 sebelum dia masuk kereta perayu. Walaupun PW8 bersetuju dengan cadangan bahawa ia adalah mungkin dadah yang dipersoalkan itu dimiliki oleh PW1. Bukan sahaja pendakwaan tidak memanggil Mohd Halim sebagai saksinya, dia juga tidak ditawarkan kepada pembelaan. Hakim perbicaraan patut menggunakan inferens

bertentangan di bawah s 114(g) Akta Keterangan 1950 terhadap pendakwaan kerana gagal untuk memanggil Mohd Halim (lihat perenggan 34–36).]

Notes

For cases on uncorroborated accomplice evidence, see 7(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 82–84.

Cases referred to

K Abdul Rasheed v Public Prosecutor; Ah Chak Arnold v Public Prosecutor [1985] 1 MLJ 193 (refd)

Lawrence Masuni & Anor v Public Prosecutor [2013] MLJU 1635; [2014] 9 CLJ 1038, FC (refd)

Odin bin Hasbi & Ors v Public Prosecutor [2000] MLJU 405; [2000] 8 CLJ 411, HC (refd)

PP v Abdul Rahman bin Akif [2007] 5 MLJ 1; [2007] 4 CLJ 337, FC (distd)

PP v Ku Hang Chua [1975] 2 MLJ 99 (refd)

Legislation referred to

Criminal Procedure Code s 254, 254(3)

Dangerous Drugs Act 1952 ss 2, 37(d), 37(da)(vi), 37B(1)(b), 39B(1)(a), (2)

Evidence Act 1950 ss 9, 114(b), (g), 133

Penal Code ss 34, 376

Appeal from: Criminal Trial No 45A-34–10 of 2015 (High Court, Penang)

M Manoharan (M Manoharan & Co) for the appellant.

Mohamed Farizal bin Mohamed Fedder (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Kamardin Hashim JCA (delivering judgment of the court):

INTRODUCTION

[1] The appellant was charged and tried in the High Court of Malaya at Penang with an offence of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') punishable with the mandatory death penalty under s 39B(2) of the same Act. The charge reads:

> Bahawa kamu pada 20hb September 2014, jam lebih kurang 10.45 malam, di tepi Jalan Gurdwara, di dalam Daerah Timur Laut, di dalam Negeri Pulau Pinang, telah memperedarkan dadah berbahaya iaitu sejumlah 1,924 gram dadah jenis Cannabis dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] At the end of the trial, the appellant was found guilty by the learned High Court judge ('learned trial judge'). The appellant was convicted and sentenced to suffer the mandatory death penalty as mandated under s 39B(2) of the Act.

[3] Aggrieved by the conviction and sentence, the appellant appealed to this court. We heard the appeal on 29 October 2018, and after hearing the parties, we unanimously allowed the appellant's appeal. We now give our reasons for allowing the appellant's appeal.

THE PROSECUTION'S CASE

[4] The factual matrix of the prosecution's case was well encapsulated in the learned trial judge's grounds which may be summarised as follows.

[5] On 20 September 2014 at about 10.45pm, L/Corp Syamsul Ezzuan bin Muhammad Ayob ('PW6') together with his colleague, L/Corp Mahadi were carrying out anti-crime patrolling duty in plain clothes on motorcycles. While on duty, PW6 saw a silver Hyundai car bearing registration No PFC 8004 ('the car') stopping beside the Nusantara Flats at Jalan Makloom, Penang. PW6 saw two people inside the car behaving suspiciously.

[6] PW6 and his colleague then approached the car but the car suddenly sped off. PW6 and his colleague chased after the car. In the course of the chase, the car turned into Jalan Gurdwara and collided onto the front of an oncoming Toyota Vios car bearing registration No PJF 6148 driven by Quah Lian Kok (PW5).

[7] Consequent to the collision, the car stopped. PW6 and his colleague identified themselves as policeman to the two occupants in the car. They were later identified as the appellant who was behind the wheels and the passenger seated in front beside him as one Mohd Shariffuddeen bin Noorul Ameen (PW1).

[8] PW6 and L/Corp Mahadi thereafter detained the appellant and PW1 and conducted a body search on them respectively but nothing incriminating were found on each of them. PW6 then searched inside the car and found a package with coloured decorated wrapping paper with printed words 'The best my friend' lying on the back seat of the car. Upon searching the said package, PW6 found it to contain two compacted slabs of dried plant materials suspected to be cannabis sealed in transparent plastic. Upon further checking, PW6 recovered a receipt described as 'Referral Form' bearing the appellant's name from the front dashboard of the car.

[9] Consequently, both the appellant and PW1 were arrested and together with the drugs exhibit recovered from the car were taken back to Timur Laut Police Headquarters and had them handed over to Inspector Amir Firdaus bin Ismail ('PW8') for further action.

[10] Investigation by PW8 revealed that the car is registered in the appellant's name.

[11] On 24 September 2014 at 15.07pm, PW8 sent the two compacted slabs of dried plant materials to the chemist, Teoh Choon Ping ('PW4') for analysis. PW4 analysed the two slabs and confirmed that they were cannabis with a combined weight of 1,924g. PW4 also confirmed them to be cannabis as defined in s 2 of the Act. PW4 tendered his report as P20, which can be found at p 34, appeal record Vol 3.

FINDINGS AT THE END OF THE PROSECUTION'S CASE

[12] The learned trial judge had considered and accepted the testimonies of PW4 on the analysis undertaken by the witness before concluding that the two slabs were cannabis with a total weight of 1,924g.

[13] As for the element of possession, the learned trial judge accepted the evidence of PW6 and PW1 which proved the fact that the appellant was in custody and control of the car registered under his name and as such the appellant was in custody and control of the drugs found on the backseat of the car coupled with the conduct of the appellant in hurriedly speeding off. The learned trial judge further invoked the statutory presumption under s 37(d) of the Act where the appellant shall be deemed to have been in his possession the impugned drugs and to have known the nature of such drug, until the contrary is proved. Therefore, the appellant was held to have been in possession of the impugned drugs.

[14] As to the element of trafficking, the learned trial judged invoked the presumption under s 37(da)(vi) of the Act since the weight of the drugs involved was more than the minimum weight of 200g of cannabis to trigger the presumption of trafficking under the Act. It is a rebuttable presumption.

[15] After being satisfied that all the elements of the charge had been established, the learned trial judge found that the prosecution had proven a prima facie case against the appellant. Thus, the appellant was ordered to enter his defence on the charge preferred.

THE DEFENCE

[16] The appellant elected to give evidence under oath. The appellant was the sole witness for the defence. In his defence, the appellant claimed that on the night in question he met PW1 after prayers and PW1 asked for his help to send PW1 to a flat at Jalan Yahudi to hand over a birthday gift to his friend. The appellant saw PW1 brought into his car a package and put it on at the backseat. The appellant said he was tricked by PW1 to ferry and deliver the package that contained the drugs which the appellant did not have any knowledge of. When the police approached them, PW1 alerted him and ordered him to speed off. Whilst being chased by the police, he tried to stop the car but was prevented by PW1 which resulted in the car losing control and ultimately colliding with the other car.

[17] After considering the defence, the learned trial judge found that the appellant had not succeeded in raising a reasonable doubt in the prosecution's case. The learned trial judge found that the defence put up by the appellant that he was an innocent carrier having no knowledge of the impugned drugs could not be believed. The learned trial judge accepted and believed the evidence of PW1 who testified during the prosecution's case that PW1 did not bring into the appellant's car the package containing the impugned drugs.

[18] The learned trial judge did not believe the appellant's defence of an innocent carrier. The learned trial judge also did not believe that the appellant did not have knowledge as regard to the contents of the package as the package was partially unwrapped. Finally, the learned trial judge held that the appellant has failed to rebut the presumption of trafficking invoked pursuant to s 37(da)(vi) of the Act on the balance of probabilities.

[19] The appellant was thus found guilty and convicted, and sentenced to suffer the mandatory death penalty as mandated under s 39B(2) of the Act. Hence, the appeal before us.

THE APPEAL

[20] Before us, learned counsel for the appellant canvassed only one solitary ground for us to allow the appellant appeal and to set aside the conviction and sentence of the learned trial judge. The only issue argued by learned counsel was that the prosecution relied solely and heavily on the evidence of PW1 to bring home the conviction against the appellant. Likewise, the learned trial judge relied on the evidence of PW1 in holding that the appellant was in possession of the impugned drugs. Learned counsel submitted that the evidence of PW1 should be expunged as PW1's testimony was unreliable and uncorroborated due to the fact that PW1 was an accomplice. Learned counsel

A relied on two High Court decisions in *Public Prosecutor v Ku Hang Chua* [1975] 2 MLJ 99 and *Odin bin Hasbi & Ors v Public Prosecutor* [2000] MLJU 405; [2000] 8 CLJ 411.

OUR DECISION

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[21] The material evidence of PW1 heavily relied upon by the learned trial judge in convicting the appellant was that PW1 went into the appellant's car to collect 'duit panggu' (alms) of RM450 from the appellant. PW1 further said when the police approached them, the appellant sped off and when he asked C why, the appellant told him 'dalam kereta ada barang'. PW1 said he did not bring anything when he entered the appellant's Car and his friend by the name Mohd Halim can verify this. PW1 denied any knowledge of the impugned drugs recovered by the police from the backseat of the appellant's car after their arrest. D

[22] In his defence, which was clearly in contrast with the testimony of PW1, the appellant's version was that PW1 asked for his help to ferry him to Flat Yahudi for PW1 to hand over a birthday gift to his friend. The appellant said E that the package wrapped in birthday wrapper was brought into his car by PW1 and it was subsequently torn by the police when they want to look at what was the thing inside the package.

[23] We observed that the indisputed facts in this appeal was that PW1 was F arrested together with the appellant. PW1 in fact was charged together with the appellant as co-accused in respect of the same impugned drugs. Nevertheless, on the first day of the hearing, the learned deputy public prosecutor ('learned DPP') withdrew the charge against PW1 and asked for him to be discharged not amounting to an acquittal ('DNAA') under s 254 of the Criminal G Procedure Code. Subsequently, on the same day, PW1 was called as the first witness for the prosecution (PW1). Therefore, we agreed with the learned counsel that PW1 was in fact an accomplice and it is trite law that the evidence of an accomplice required corroboration.

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[24] Section 114(b) of the Evidence Act 1950, the court may presume until the contrary is prove, that an accomplice is unworthy of credit unless he is corroborated in material particulars. Section 114(b) reads:

> 114 The court may presume the existence of any fact which it thinks likely to have I happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
>
> ILLUSTRATIONS
>
> The court may presume —

(a) ...;

(b) that an accomplice is unworthy of credit unless he is corroborated in material particulars;

(c) ...

[25] The learned trial judge held that the evidence of PW1 had been supported by the appellant's own conduct in speeding off and the conduct of the appellant uttering the words 'matilah saya' when the police uncovered the impugned drugs inside the birthday package. We are of the view that the conduct of speeding off had been explained by the appellant. We find that the explanation was probable and admissible under s 9 of the Evidence Act 1950. As regard to the words spoken by the appellant 'matilah saya', it was wrongly admitted by the learned trial judge as it amounted to a confession to which no caution under s 37B(1)(b) of the Act had been administered before or soon after the words were uttered by the appellant. At that time, the appellant and PW1 were already under police arrest.

[26] We are mindful of s 133 of the Evidence Act 1950 that a conviction based on the evidence of an accomplice alone is not illegal. Section 133 reads:

133 Accomplice

An accomplice shall be a competent witness against an accused person, and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

[27] Nevertheless, case law had warned of the danger of concocted story by an accomplice to throw the blame on the accused person. We just need to cite a Federal Court case of *Lawrence Masuni & Anor v Public Prosecutor* [2013] MLJU 1635; [2014] 9 CLJ 1038 at p 1061:

[97] As expressed by *Sarkar's Law of Evidence* (16th Ed) Reprint 2008 at p 2245:

... that although uncorroborated testimony of an accomplice is strictly admissible, and a conviction based on it is not illegal, yet experience teaches us that an accomplice being always an infamous person, it is extremely unsafe to rely upon his evidence unless it is materially corroborated, and that it is the long established and universal practice both in India and England for judges to guard their minds carefully against acting upon such evidence when uncorroborated. The rule as to corroboration has become a settled rule of practice of so universal an application that it has now assumed the force of a rule of law.

[98] It is also significant to add that the said corroborative evidence must also implicate the appellants (whether directly or otherwise) with the crime.

[99] As illustrated in the *locus classicus* on corroborative evidence, ie, *R v Baskerville* [1916] 2 KB 658, it was observed, inter alia, by Lord Reid that:

... it must be evidence which implicates him, that is, which confirms in some

material particular not only the evidence that the crime has been committed, but also that the prisoner committed it ...

[100] As Lord Hailsham of St Marylebone LC made clear in *R v Kilbourne* [1973] AC 729 (HL), the reason why accomplice evidence requires corroboration is the danger of a concocted story designed to throw blame on the accused. The danger is not less, but may be greater, in the case of fellow accomplices. Their joint evidence is not independent in the sense required by *R v Baskerville* and a jury must be warned not to treat it as corroboration. But this illustrates the danger of mistaking the shadow for the substance.

[28] We emphasised that the appellant's defence was that on the day in question he picked up PW1 who was carrying the birthday package. PW1 placed the package at the backseat of his car and PW1 sat at the front passenger seat. The appellant testified that he received a call from PW1 before that incident. PW1 asked to be sent to Flat Jalan Yahudi to deliver the birthday package to a friend which he complied. While at Nusantara flat road, PW1 asked him to speed off when two policeman approached his car. PW1 told him that the package he brought along contained 'barang salah' and PW1 asked him to drive at a fast speed to avoid being arrested by the police. He could not stop the car as the steering was controlled by PW1.

[29] We observed that the defence version had been put to the witnesses during the prosecution's case. With that, it could not be held that the defence of the appellant was an afterthought. The defence version was put to PW1 as can be found at pp 25–27, appeal record, Vol 2:

Manveer Singh: So setuju dengan saya sebelum ini kamu tak pernah nampak OKT bawa kereta ke masjid. Setuju?

SP1: Saya tak pernah nampak.

Manveer Singh: Saya katakan di sini pada hari itu kamu telah telefon Kanathi untuk ambil duit dan minta dia tolong untuk bawa kamu berjumpa dengan kawan kamu di Relau untuk sambutan hari jadi?

SP1: Saya tidak setuju.

Manveer Singh: Setuju dengan saya kamu beritahu OKT bahawa motosikal kamu tidak dalam keadaan baik dan kamu minta bantuan untuk membawa kamu ke Relau. Setuju atau tidak?

SP1: Saya tidak setuju.

Manveer Singh: Saya nyatakan di sini kamu cuba mempergunakan OKT dalam kes ini?

SP1: Saya tidak setuju.

Manveer Singh: Saya menyatakan kepada kamu tujuan kamu mempergunakan OKT kerana OKT ada kereta dan dengan memperlibatkan kereta orang lain peluang untuk dikesan adalah lebih rendah. Setuju atau tidak?

SP1: Saya tidak setuju.

Manveer Singh: So kamu mempergunakan OKT untuk menghantar ganja. Setuju atau tidak? A

SP1: Saya tidak setuju.

Manveer Singh: Kamu menipu kepada OKT dengan menggunakan alasan untuk menghantar hadiah hari jadi kepada kawan kamu. Setuju? B

SP1: Saya tak setuju.

Manveer Singh: Dengan sebab itu kamu telah membalut ganja itu dengan pembalut hadiah the title 'The best my friend'. Setuju atau tidak setuju?

SP1: Tidak setuju. C

Manveer Singh: Saya katakan kamu membalut ganja itu sebab itu kamu tahu bahawa barang itu dalam keadaan berseal.

SP1: Saya tidak setuju.

Manveer Singh: Pada malam itu semasa dalam kereta apabila kamu nampak polis, kamu yang suruh. Kanathi pecut kereta secara tiba-tiba. Setuju? D

SP1: Saya tidak setuju.

Manveer Singh: Dan disebabkan Kanathi terkejut dia mengikut arahan kamu. Setuju atau tidak setuju?

SP1: Saya tidak setuju. E

Manveer Singh: Saya katakan kepada kamu, kamu jerit dengan cemas dan secara tiba-tiba kamu katakan polis cepat-cepat.

SP1: Saya tidak setuju.

Manveer Singh: Apabila pecut Kanathi bertanya kepada kamu pecut dan kamu beritahu hadiah yang dibalut itu adalah ganja. F

SP1: Saya tidak setuju.

Manveer Singh: Saya nyatakan di sini apabila Kanathi tahu keadaan ini dia ingin berhenti kereta dan kamu tidak benarkan. G

SP1: Saya tidak setuju.

Manveer Singh: Saya nyatakan kepada kamu memegang stereng kereta dan tidak membenarkan Kanathi berhenti kereta.

SP1: Saya tidak setuju. H

Manveer Singh: Dan disebabkan pergelutan itu kereta telah hilang kawalan dan terlanggar sebuah kereta Vios dan terbabas.

SP1: Saya tidak setuju.

[30] The evidence before the learned trial judge as regard to who brought the impugned drugs in the car owned and driven by the appellant is a question of fact to be decided upon the evidence of either the appellant or PW1. The learned trial judge believed and accepted the evidence of PW1 eventhough the I

learned trial judge found that PW1 is an accomplice. However, we are of the view that it is not safe to rely on PW1's evidence due to two infirmities in PW1's evidence.

[31] Firstly, it was PW1's testimony that he entered the appellant's car just to get 'duit panggu' in the sum of RM450 from the appellant. If it is so, why the need for PW1 to get into the car and sat in the front seat and travelled in the car with the appellant. It is probable that the appellant's version that he was asked by PW1 to be sent to Flat Yahudi to hand over a birthday package to his friend which was later found to contain the impugned drugs was true. Furthermore, the police never recovered the so called 'duit panggu' of RM450 either from PW1 or from the appellant nor from the car.

[32] Secondly, PW1 testified that he was with his friend, Mohd Halim before he entered the appellant's car. PW1 said that he did not bring in anything, not the impugned drugs in the birthday package into the appellant's car and Mohd Halim can confirm this. In examination in-chief, PW1 stated, at pp 12–13, appeal record, Vol 2:

> Lim Cheah Yit DPP: OK sebelum encik masuk ke dalam kereta OKT masa itu encik ada bersama kawan-kawan tak atau siapa-siapa yang nampak encik di situ?
>
> SP1: Kawan saya ada nampak. Semasa saya bersembang dengan dia kawan saya lihat saya dari belakang.
>
> Lim Cheah Yit DPP: Ada kawan lihat encik masuk kereta OKT?
>
> SP1: Ya. Saya jalan saya letak motor saya dekat belakang kereta dia saya masuk. Saya parking motosikal di belakang kereta dia saya jalan masuk, kawan saya nampak saya.
>
> Lim Cheah Yit DPP: Siapa nama kawan kamu?
>
> SP1: Kawan saya nama Mohd Halim.
>
> Lim Cheah Yit DPP: Tadi encik kata encik masuk ke tempat penumpang hadapan ya?
>
> SP1: Ya.

Under cross-examination, PW1 said at pages 32-33, Appeal Record, Volume 2 as follows:

> Manveer Singh: Kamu katakan Halim ada nampak kamu masuk ke dalam kereta Kanathi setuju?
>
> SP1: Saya setuju.
>
> Manveer Singh: Sekiranya kamu tahu kamu tidak bersalah, Halim boleh buktikan bahawa kamu tidak bersalah. Setuju?
>
> SP1: Ya saya setuju.
>
> Manveer Singh: Boleh bagitahu saya nama penuh En Halim?
>
> SP1: Mohd Halim.

Manveer Singh: Nombor telefon dia?

SP1: Nombor telefon dia saya tak ingat.

Manveer Singh: Berapa lama kamu kenal Halim?

SP1: Dalam setahun.

Manveer Singh: So setuju dengan saya bahawa Halim boleh menolong kamu untuk membuktikan kamu tidak bersalah setuju?

SP1: Ya saya setuju.

Manveer Singh So sekiranya kenyataan Halim penting mengapa kamu tidak memberitahu kepada perakam. Adakah kamu memberitahu kepada pihak perakam polis tentang Halim?

SP1: Ya saya beritahu. Dia ambil statement saya.

Manveer Singh: So kamu memberitahu pegawai perakam bahawa Halim ada nampak kamu masuk ke dalam kereta Kanathi. Setuju?

SP1: Ya saya setuju.

Manveer Singh: Saya nyatakan kepada kamu bahawa cerita kamu adalah rekaan sahaja dan cerita ini adalah untuk melepaskan diri sendiri?

SP1: Saya tidak setuju.

[33] The investigating officer, PW8 under cross-examination revealed that there was a witness who saw PW1 entering the car, but nevertheless all questions put to PW8 regarding this witness (Mohd Halim) were not allowed by the learned trial judge as he found it to be irrelevant. We are of the view that the learned trial judge had misdirected himself in his ruling. The notes of evidence at pp 112–114, appeal record, Vol 2 disclosed as follows:

KW Lee: Tuan, saya nak tanya tentang kejadian yang berkaitan dengan kes hari ini. Pada tarikh ini lebih kurang pukul 10 ke 1 sebelum pukul 1, saya dimaklumkan oleh Puan DPP dalam kes ini bahawa ada seorang saksi awam. Adakah saksi awam itu ada datang ke mahkamah setahu kamu?

SP8: Boleh ulang soalan?

KW Lee: Ok you dengar one step by step. Pada hari ini kami baru dimaklumkan oleh Puan DPP bahawa seorang saksi awam akan hadir dan kamu juga tahu sebab saya difahamkan kamu ada ditugaskan untuk check untuk panggil saksi tersebut. So soalan saya adakah saksi itu hadir di mahkamah atau hadir di bangunan mahkamah?

SP8: Setuju ada hadir.

KW Lee: Tetapi ada penyebab kami semua mahkamah ini tidak kes ini dipanggil semula, kami difahamkan saksi tersebut tidak dipanggil lagi adakah benar? Jadi setujukah atas pernyataan saya ini? Saya katakan sebenarnya saksi ini boleh dijejaki dan ada boleh dipanggil tetapi tidak dipanggil.

Hakim: I think that is a more question of law.

KW Lee: Whether maybe he understand.

Hakim: But that is his opinion, he is not the prosecution witness/counsel. So we leave that question out.

KW Lee: I will change the question My Lord. Maksudnya saksi tersebut pada hari ini ada di bangunan mahkamah tetapi pada hari ini saksi tersebut tidak datang untuk memberi keterangan. Setuju atau tidak?

SP8: Tak faham dia cakap datang lepas itu tak datang.

KW Lee: Saksi hari ini memang ada di bangunan mahkamah tetapi finally tidak dipanggil untuk memberi keterangan di mahkamah. Setuju atau tidak?

SP8: Setuju.

KW Lee: Soalan seterusnya, bolehkah kamu memberitahu mahkamah pada hari ini nama saksi tersebut?

Hakim: I think that is not relevant.

Puan Emma DPP: YA saya percaya yang itu tak relevant.

KW Lee: Relevant, YA because Puan DPP at first initially bring this witness to the court so at least when we ask who is the witness she wouldn't reveal so since IO is established that is such a witness so at least we must know the name?

Puan Emma DPP: YA adalah hak pendakwaan untuk sama ada panggil atau tidak saksi tersebut untuk memberi keterangan.

Hakim: That's right I think I rule that is irrelevant.

Manveer Singh: Apologies, Y.A. Because he is the last witness and there won't be anymore witnesses called after this. So that's why we want to know who is the witness. Because in the previous En Shariffuddeen he did mentioned some names who was his friends. He mention about the guy who runs the mosques, the guy who saw him, the few names he mentioned. So we want to know who is that person. At least if that name is mentioned if the name in the our cross that Shariffuddeen gave. It wont damage the prosecution case because it is the end of case, YA. So I think by asking the name the cross so he has to answer, YA. That is all we want to know.

Hakim: I rule it is irrelevant. So I mean you all know the names from testimony of Shariffuddeen so we all think in that case I would call for the defence you all cannot recall those people.

Manveer Singh: YA we want to know who is the person. Hakim: Ok since they didn't call I rule that is irrelevant.

Hakim: Ok since they didn't call I rule that is irrelevant.

KW Lee: Adakah saksi yang dikatakan tidak hadir tersebut seorang lelaki atau seorang perempuan?

Hakim: I think you should not ask the person.

[34] We are constrained to hold that the learned trial judge erred in law and in fact when he prematurely decided the witness Mohd Halim's evidence as irrelevant. In our considered opinion Mohd Halim is a very important and very relevant witness to this case as this witness if called to give evidence would be able to say whether the birthday package which contained the impugned drugs

were in the hands of PW1 before he entered the car driven by the appellant or otherwise. Even PW8 agreed with the suggestion that it is possible that the impugned drugs belong to PW1. At pp 110–111, appeal record, Vol 2, PW8 said:

> Manveer Singh: Inspektor Amir soalan seterusnya untuk kes ini setuju bahawa Shariffuddeen dengan Kanathi dituduh bersama-sama setuju?
>
> SP8: Setuju.
>
> Manveer Singh: So setuju dengan saya ada kemungkinan bahawa dadah yang dijumpai milik Shariffuddeen juga?
>
> SP8: Pada siasatan saya kemungkinan ada.

[35] Based on the totality of the evidence and circumstances of this case, we have no hesitation to hold that Mohd Halim is a very important witness in determining the guilt of the appellant. Yet, the prosecution did not call Mohd Halim to the stand to tell his version of the issue. Not only that, Mohd Halim was never offered to the defence. As can be seen at p 116, appeal record, Vol 2, before closing their case, only three witnesses were offered to the defence, that is, Ahmad Mahadi bin Md Saad, Puan Nurul Rifqah bt Shafie and ASP Ahmad Dahuri bin Mohammad Esa. Mohd Halim was not in the list.

[36] In our view, it is incumbent upon the prosecution to have called Mohd Halim to the stand. Failure to do so, the learned trial judge should, to our mind, have invoked the adverse inference under s 114(g) of the Evidence Act 1950 against the prosecution. We are constrained again to hold that the learned trial judge had misdirected himself in law and in fact for non-direction in this matter.

[37] As alluded earlier in our judgment, PW1 was given an order of discharge not amounting to an acquittal ('DNAA') by the learned trial judge upon request by the learned DPP under s 254 of the Criminal Procedure Code ('the CPC'). The order of DNAA of SP1 as evinced at pp 1–2 of the appeal record, Vol 2 showed:

> Pn Emma DPP: YA sebelum saya memulakan kes ini arahan saya adalah untuk tarik balik pertuduhan ke atas OKT Kedua Mohamed Shariffuddeen bin Noorul Ameen akan dijadikan sebagai saksi pendakwaan. Pertuduhan ke atas OKT Mohamed bin Kanathi akan diteruskan.
>
> RSN Rayer: YA I thank for the ...
>
> Hakim: Dibenarkan YA. Let me just record first. Prosecution wishes to withdraw charge without amounting to acquitted against the second accused who shall then be a prosecution witness. Accordingly I order that the second accused be discharged and not amounting to acquittal.

[38] For ease of reference, we reproduce s 254 of the CPC as follows:

254 Public Prosecutor may decline to prosecute further at any stage

(1) At any stage of any trial, before the delivery of judgment, the Public Prosecutor may, if he thinks fit, inform the Court that he will not further prosecute the accused upon the charge and thereupon all proceedings on the charge against the accused shall be stayed and the accused shall be discharged of and from the same.

(2) At any stage of any trial before a Sessions Court or a Magistrate's Court before the delivery of judgment, the officer conducting the prosecution may, if he thinks fit, inform the Court that he does not propose further to prosecute the accused upon the charge, and thereupon all proceedings on the charge against the accused may be stayed by leave of the Court and, if so stayed, the accused shall be discharged of and from the same.

(3) Such, discharge shall not amount to an acquittal unless the Court so directs.

[39] We observed that eventhough the learned trial judge had a discretionary power to direct an acquittal under sub-s 254(3) of the CPC, nevertheless he did not exercise his discretionary power in the instant case. The order of the court remained that PW1 was DNAA of the charge earlier preferred against him by the learned DPP. By an order of DNAA, the charge against PW1 is stayed and there is no bar for the prosecution to rearrest and recharge PW1 at a later stage. There is ample persuasive authority for the proposition that unless some good grounds are shown, it would not be right to leave PW1 saddled with a charge hanging over his head for an indeterminate period. However, PW1 himself did not apply for a discharge amounting to an acquittal (*K Abdul Rasheed v Public Prosecutor; Ah Chak Arnold v Public Prosecutor* [1985] 1 MLJ 193).

[40] As we alluded to earlier, the learned trial judge relied heavily and substantially on the evidence of PW1 in convicting the appellant. We are of the considered view that the learned trial judge had committed an appealable error when he relied on the evidence of PW1 in convicting the appellant when in fact PW1's evidence should be excluded from consideration or expunged. We found support on this proposition from the two cases cited by the appellant's learned counsel. In *Public Prosecutor v Ku Hang Chua*, Yusoff J said at p 101:

I have excluded John Lu Su Thiam's (PW4) evidence entirely, though he gave evidence impressively in court which corroborates the complainant's evidence not only in material particular but also in detail: not because he is not competent to give evidence being himself an accomplice in the offence. But I consider the fact that the charge against him has been withdrawn by the prosecution at the last moment with the plea that he should not be acquitted and in fact he was not acquitted, gives rise to the inference that he was influenced by a continuing inducement to give favourable evidence for the prosecution. The inducement is too strong as it is coupled with a threat that proceedings would be continued against him at any time by the prosecution, to allow the court to admit his evidence.

In *R v Pipe* it is adjudged that this practice has become the rule of law. The facts of that case showed that the prosecution called at the trial of the appellant an accomplice against whom proceedings had been brought, but had not been

concluded. It was held that it was the duty of the prosecution if they were still minded to call the accomplice as a witness, to let it be known that in no event would proceedings against him be continued and as this had not been done, there had been a departure from the established rule of practice.

In *Regina v Turner and Others* reported in Times Law Report of March 24, 1975, Lord Justice Lawton is reported to have said while referring to the practice of granting immunity against prosecution or further prosecution that:

> It was in the public interest that criminals should be brought to justice; and the more serious the crimes the greater was the need for justice to be done. Employing Queen's evidence to accomplish that end was distasteful — to judges, lawyers and members of the public.

It is further reported that His Lordship distinguished this practice from doubting the well-established practice of calling accomplices on behalf of the Crown who had been charged in the same indictment as the accused and who had pleaded guilty.

[41] In *Odin bin Hasbi & Ors v Public Prosecutor*, the facts are similar to the instant appeal before us. From the outset, four persons were originally charged for an offence of rape punishable under s 376 of the Penal Code and read together with s 34 of the same Code. Prior to the commencement of the trial, the prosecution applied for the fourth accused to be discharged not amounting to an acquittal. The said application was granted by the learned sessions court judge, which consequently led the fourth accused to become a prosecution witness (PW1). Muhammad Kamil Awang J in a similar sentiment, at p 415 ruled:

> Coming to the 2nd ground of the 1st appellant's appeal, the learned counsel for the 1st appellant submitted that the learned Sessions Court judge misdirected herself in convicting the 1st appellant by relying on the evidence of PW1. As I have explained in earlier part of this judgment, PW1 was originally charged together with the three appellants herein with the same offence. Prior to the trial, application was made by the prosecution to discharge PW1 not amounting to acquittal, thus, enabling him to become a prosecution witness. In a similar case of this nature, where an accused was charged with rape, the evidence of an accomplice who had been discharged but not acquitted was excluded from the consideration of the court as held in *Public Prosecutor v Ku Hang Chua* [1975] 2 MLJ 99 at p 101:
>
> > I have excluded John Lu Su Thiam's (PW4) evidence entirely, though he gave evidence impressively in court which corroborates the complainant's evidence not only in material particular but also in detail; not because he is not competent to give evidence being himself an accomplice in the offence. But I consider the fact that the charge against him has been withdrawn by the prosecution at the last moment with the plea that he should not be acquitted and in fact he was not acquitted, gives rise to the inference that he was influenced by a continuing inducement to give favourable evidence for the prosecution. The inducement is too strong as it is coupled with a threat that proceedings would be continued against him at any time by the prosecution, to allow the court to admit his evidence.

Concurring with the abovesaid principles as enunciated, I am also of the same sentiment that the evidence of PW1 in the instant case ought to be excluded from the consideration of the learned Sessions Court judge, albeit, with or without any warning thereto.

[42] We agreed with learned counsel's submission that if the evidence of PW1 is excluded, the whole case of the prosecution tumbled, and the charge against the appellant could not stand.

[43] One final point we would like to comment on is with regard to paras 83 and 84 of the learned trial judge grounds of judgment at pp 87–88 of the appeal record, Vol 1 which we quoted below:

> 83. Be that as it may and in spite that SP1 is an accomplice, I find and hold that this finding does not exculpate the accused in the circumstances herein. They were joint traffickers here.
>
> 84. I am mindful that the acceptance of accomplice evidence is subject to the guidelines laid down in *Sabarudin bin Non & Ors v Public Prosecutor*. Even if the testimony of SP1 is discarded as suggested by the defence following *Public Prosecutor v Ku Hang Chua*, it is immaterial because there is adequate other independent evidence to convict the accused for trafficking in the Drugs. I did not have to rely on SP1's testimony here and I didn't as a matter of fact. In this regard, the accused were in joint custody and control of the Drugs with SP1 in the Car. The accused knew of the existence and the nature of the Drugs from its open exposed and partially unwrapped condition. He was thus in actual possession of the Drugs. Moreover he was trafficking in the Drugs by transacting in the sale and purchase and/or distribution of the Drugs with SP1. The act of trafficking in the Drugs by the accused is corroborated by the conduct when he sped off in the Car and continued speeding in it while being chased by the police as well as his subsequent own oral admission that he uttered 'Matilah saya!' upon eventual capture and arrest by the police. Put together, the accused is damned. The facts here are in my opinion even more damning upon the accused than that in *Public Prosecutor v Abdul Rahman bin Akif*.

[44] We observed that the learned trial judge decision that without the evidence of PW1 he relied on other independent evidence to which we find earlier in our judgment that those evidence were not admissible and unreliable. It was wrong for the learned trial judge to equate the appellant's case with that of *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337 which is distinguishable based on the facts of that case. In that case, the accused was all alone in the car driven by him when the drugs were found hidden under the driver's and the front passenger's seat. How could the learned trial judge rely on the decision of the case when the facts of the case are materially different.

CONCLUSION

[45] For the reasons above stated, we held that there were merits in the appeal. We found the conviction to be unsafe. Therefore, we allowed the appellant's appeal. The conviction and sentence of the High Court were set aside and the appellant was acquitted and discharged forthwith.

Appeal allowed; conviction and sentence set aside and appellant acquitted and discharged.

Reported by Ashok Kumar